

In the Matter of)
) MB Docket No. 07-42
Leased Commercial Access)

COMMENTS OF
CARIBEVISIÓN HOLDINGS, INC. AND CARIBEVISIÓN TV NETWORK, LLC
TO PETITION FOR RECONSIDERATION OF
TVC BROADCASTING, LLC

CaribeVisión is an independent video programmer, unaffiliated with any cable operator, which provides Spanish-language programming to broadcast station affiliates and cable television systems. In addition, subsidiaries of CaribeVisión Holdings, Inc. own and operate full

power and low power television broadcast stations. CaribeVisión currently provides programming to cable television subscribers under the commercial leased access rules at issue. CaribeVisión previously filed comments to the Notice of Proposed Rulemaking in the instant docket.

A. Channel Placement

1. Congress and the Commission Have Recognized the Significance of Channel Placement. Although Section 612 of the Communications Act of 1934, as amended, does not specifically mandate particular channel placement requirements, both Congress and the Commission have long recognized the significance of the issue of channel placement in the success or failure of leased access programming. The legislative history of the 1992 amendments to Section 612 reveals that Congress understood that the purpose of leased access would be defeated if leased access programmers were placed on tiers that few subscribers access.¹ The 1992 Senate Report states that “[t]he FCC should ensure that [leased access] programmers are carried on channel locations that most subscribers actually use.”² It further states that “it is vital that the FCC use its authority to ensure that these channels are a genuine outlet for programmers.”³ Accordingly, the Commission’s rules mandate that leased access programmers are entitled to demand access to a programming tier with a subscriber penetration greater than 50%. The rules also provide, however, that the particular tier and channel placement is left to the discretion of the cable operator, provided that the operator’s choice is “reasonable.”⁴

¹ Senate Committee on Commerce, Science and Transportation, S. Rep. No. 102-92, at 79 (1992) (“1992 Senate Report”).

² *Id.*

³ *Id.*

⁴ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Leased Commercial Access, Second Report and Order and Second Order on

The rules further provide that disputes involving channel placement be evaluated on a case-by-case basis.⁵ Through these rules, the Commission sought to “promote the statutory goals of leased access by allowing leased access programming to reach the majority of subscribers of a cable system, in accordance with Congress’ intent.”⁶

2. The Record Reflects the Persistence of Unreasonable Channel Placement

Practices. Despite these provisions, leased access programmers continue to encounter difficulties in obtaining reasonable channel positions.⁷ The record reflects that channel placement has been a distinct problem for many leased access programmers.⁸ Shop NBC, for instance, reported that a number of cable systems assigned it to channel positions in the 95-99, 00-01 range. As Shop NBC noted, a number of television sets cannot tune to these frequencies without extra expense being invested in the television set’s tuner.⁹ Similarly, iNFO Channel Group documented its placement on a channel that was subject to interference from FM radio signals and was greatly isolated from channels containing comparable programming.¹⁰ This channel placement limited the viewability of iNFO Channel’s programming and made it more difficult for iNFO Channel to attract and retain the advertisers needed to maintain its business.¹¹ Thus, despite the fact that the current leased access rules require that channel placements be “reasonable”, the record below demonstrates that many unreasonable practices are commonplace.

Reconsideration, 12 FCC Rcd 5267, ¶83-89 (1997) (“Second Report and Order”); 47 C.F.R. § 76.971(a).

⁵ 47 C.F.R. § 76.971(a)(2).

⁶ Second Report and Order at ¶87.

⁷ Petition at 1.

⁸ See Order at ¶17.

⁹ Comments of Shop NBC in MB Docket No. 07-42 at 16 (Sept. 11, 2007).

¹⁰ Comments of iNFO Channel Group in MB Docket No. 07-42 at 2 (Jul. 31, 2007) (“iNFO Channel Comments”).

¹¹ *Id.*

3. The Order Fails to Address Unreasonable Channel Placement Practices. The rule changes set forth in the Order, however, provide no additional protections against such obviously unreasonable practices. The Order merely requires that a cable operator explain and justify its channel placement policy, otherwise keeping the status quo in place.¹² Thus, as long as a cable operator “justifies” its decision to place a leased access programmer in the least accessible location on the system, the Order provides scant protection for the programmer involved. As noted above, the record reflects that, absent further guidance from the Commission, leased access programmers will continue to be placed on channels that limit viewers’ ability to locate and, in some cases, view the programming provided by leased access programmers.

4. The Commission Should Prohibit Specific Unreasonable Practices. Thus, as suggested in the Petition, the Commission should, at a minimum, clarify its rules to prohibit certain practices as *per se* unreasonable. As the Petition suggests, the placement of leased access channels among subscription and pay channels should be prohibited as unreasonable.¹³ In addition, based on the record before the Commission, CaribeVisión suggests that Commission also prohibit the placement of leased access channels on channels that have materially impaired transmission or reception quality relative to other channels on the same cable system or are isolated from other channels actively carrying comparable programming.

5. The Commission Should Provide Additional Options for LPTV Stations. Moreover, the Commission should provide additional options with respect to low power television (“LPTV”) stations being carried pursuant to the leased access provisions of the Commission’s rules. Despite the fact that LPTV stations frequently do not enjoy must-carry status, they remain broadcast facilities and should have the option of being placed in channel

¹² Order at 15.

¹³ Petition at 2.

positions comparable to other broadcasters – if for no other reason than to avoid viewer confusion as to why a select class of broadcast stations is not located among the other broadcast stations.

To that end, the Commission should require that, for LPTV stations seeking carriage pursuant to the leased access rules, cable operators shall make leased access available on tiers carrying the signals of other broadcast television stations located in the same market as the LPTV seeking carriage. The option for placement on such tiers should be in addition to whatever other tiers the cable operators make available to other leased access programmers under the Commission’s rules. Given the limited number of LPTV stations in any given market, there is no reason to expect a “flood” of such carriage requests that would displace significant numbers of other programmers or otherwise disrupt service to viewers. To the contrary, such requirements would provide greater certainty for all parties involved, including viewers that would benefit from having all broadcast signals in the same general “neighborhood” on the cable system.

B. Channel Relocations.

Once channel placement has been determined, it is equally important that the channel placement remain relatively stable. Thus, the Petition’s suggestion that leased access channels be treated no worse than other channels with respect to involuntary channel relocations is only common sense.¹⁴ For a leased access programmer to have any hope of sustainability, viewers must be able to locate the programmer’s channel, a task that is greatly complicated if that channel is subject to arbitrary relocations without reasonable notice. Thus, CaribeVisión agrees with TVC’s recommendation that the Commission clarify its Order to (a) require that cable

¹⁴ Petition at 2.

operators treat leased access programmers no less favorably than other programmers with respect to channel relocations, (b) require that cable operators give programmers four months advance notice of channel relocations, and (c) prohibit the relocation of a leased access channel during ratings periods (or, more specifically, during the four national four-week ratings periods commonly known as “sweeps”).

C. Other Petition Recommendations.

CaribeVisión generally concurs with TVC’s other recommendations. As noted in the Petition and the record below, leased access programmers are frequently forced to lease space on systems covering areas far greater than their intended service areas, even on systems that have the technical capacity to break out discrete areas for advertising insertions.¹⁵ To the extent a cable system has such capacity, it should provide leased access programmers the option of leasing only the capacity to serve such discrete areas and adjust the rate accordingly. Likewise, CaribeVisión agrees that confidentiality provisions in leased access contracts should not be permitted to be enforced to limit any party’s access to the Commission’s processes or procedures.¹⁶

D. Conclusion.

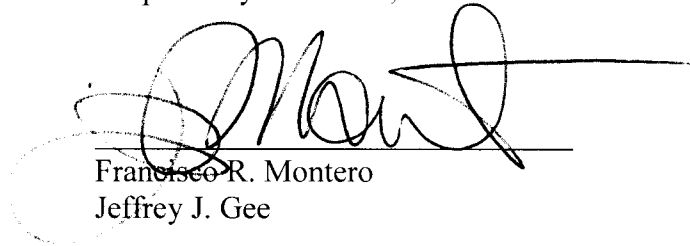
CaribeVisión, however, particularly urges the Commission to take up the channel positioning issue as described herein. As the record reflects, the current rules do not adequately address the channel placement problems faced by many leased access programmers --- problems the Order did little to address. Absent the clarifications requested by the Petition and further described herein, leased access programmers and cable operators will be forced to resort to the Commission’s complaint procedures on case-by-case basis, wasting both the Commission’s

¹⁵ Petition at 2-3; Comments of CaribeVisión in MB Docket No. 07-42 at 12-13 (Sept. 11, 2007); iNFO Channel Comments at 1.

¹⁶ See Petition at 3-4.

resources and the limited resources of the parties. By clarifying the leased access rules as described herein, however, the Commission can provide guidance that will help the parties reach “reasonable” arrangements on channel placement, to the benefit of cable operators, leased access programmers and the viewing public. For the forgoing reasons, CaribeVisión urges the Commission to grant the Petition with the additional clarifications described herein.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'F. Montero', is written over a horizontal line. Below the line, the names 'Francisco R. Montero' and 'Jeffrey J. Gee' are printed.

Francisco R. Montero
Jeffrey J. Gee

Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street - 11th Floor
Arlington, Virginia 22209
(703) 812-0440

*Counsel for CaribeVisión Holdings, Inc. &
CaribeVisión TV Network, LLC*

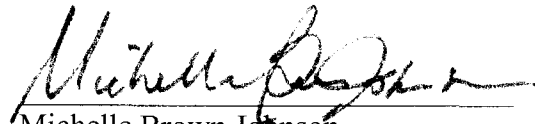
May 13, 2008

CERTIFICATE OF SERVICE

I, Michelle Brown Johnson, a secretary at Fletcher, Heald & Hildreth PLC, hereby certify that a true and correct copy of the foregoing "Comments to the Petition for Reconsideration" was sent on this 13nd day of May, 2008, via First-Class United States mail, postage pre-paid, or as otherwise specified to the following:

Matthew L. Leibowitz
Joseph A. Belisle
Leibowitz & Associates, PA
1 Southeast Third Avenue
Suite 1450
Miami, Florida 33131

Counsel for TVC Broadcasting, LLC


Michelle Brown Johnson